Managing the Complex Interplay Between the ADA, FMLA, and Workers' Compensation Laws

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I. General Overview: Difficulties in structuring time-off and accommodations for employees result from the diverse and unrelated purposes and enforcement mechanisms in various statutes that provide protections to injured or disabled employees.

A. Workers' Compensation: "no fault" system of wage replacement and medical treatment for work-related injuries and accommodation for certain temporary conditions.

B. Americans with Disabilities Act: the purpose is to prevent discrimination in the workplace against individuals with disabilities who are otherwise qualified to perform the job.

C. Family and Medical Leave Act: designed to protect employees who need to take a leave of absence because of a medical situation, emergency, or birth.

Because the standards for eligibility are different under each statutory scheme, a person may be protected under one, two, or all three. To avoid liability under one or all, an employer must be aware of when each applies, what the obligations are under the different statutory schemes, and meet those obligations without being inconsistent. [For a good summary with a helpful question and answer sections see EEOC Enforcement Guidance: "Workers' Compensation and the ADA"]

II. Summary of Each Statutory Scheme

A. Workers' Compensation: Mont. Code Ann. §§ 39-71-101 et seq.

1. The original intent of workers' compensation was to limit the cost to employers for work-related injuries. Employees give up potentially large damage awards that may be obtained in a personal injury lawsuit in exchange for immediate compensation and payment of medical treatment without the necessity of proving fault. The employer gives up the defenses it could assert in litigation, such as the worker's own contributory negligence, in exchange for spreading the cost of injuries through the purchase of insurance or becoming self-insured. The basic inquiries for determining eligibility are:

   a. Are you an "employer" recognized under the Act?
   b. Is the injured individual an "employee"?
   c. Did the injury arise in the course and scope of employment?

2. The benefits provided are determined by statutes and rules, based upon medical justification. The employee must submit medical proof to receive benefits, and a

physician must provide the necessary information to make the statutory determination of whether the disability is temporary or permanent and the scope of the impairment.

3. Anti-retaliation provision: Mont. Code Ann. § 39-71-317.

B. Americans with Disabilities Act of 1990, Title I: 42 U.S.C. §§ 12111-17; regulations implementing Title I are at 29 C.F.R. §§ 1630.1-16. [See also: Montana Human Rights Act, Rights of Persons with Disabilities: Mont. Code Ann. Section 49-4-101 et seq.]

1. ADA applies to employers with 15 or more employees or public employers.

2. Provides protection for individuals with disabilities who are qualified to perform the essential functions of a job. Unlike other non-discrimination statutes, in addition to the commandment "Thou shall not discriminate", the ADA requires an employer to take affirmative steps to provide reasonable accommodations.

a. Disability is defined as:

(1) a physical or mental impairment that substantially limits one or more major life activities (consider severity, duration, and impact in comparison to the average person);

(2) having a record of such impairment;
examples: inpatient treatment for a mental condition, prior treatment for heart disease, a recovering alcoholic or substance abuser

(3) is regarded as having such impairment.

b. "Qualified Individual with a Disability" is a person who with or without reasonable accommodation can perform the essential functions of the job.

c. "Major Life Activities" are "those basic activities that the average person in the general population can perform with little or no difficulty", 29 C.F.R. 1630.2(i), such as walking, seeing, hearing, speaking, sitting, lifting, standing, learning, breathing, thinking, concentrating, and interacting with others. Analysis: does the impairment prevent or restrict the individual from performing tasks that are of central importance to most people's daily lives. The inability to perform a single, particular job or the temporary inability to perform a job do not constitute a substantial limitation of the major life activity of working; only if the inability to work extends to a class or broad range of jobs will inability to work be considered a major life activity. 29 C.F.R. 1630.2(j)(3).

d. "Essential functions" of the job means fundamental job duties, focusing on the purpose of the function and the results to be accomplished rather than the manner in which the function is traditionally performed, unless there is no other way to perform it. A written job description is evidence of essential job functions. Consider:

- The employer's judgment as to which functions are essential
- Written job descriptions
- The amount of time spent on the job performing the function
- The consequences of not requiring performance of the function
- The terms of a collective bargaining agreement
- The work experience of past employees in the job
- The current work experience of employees in similar jobs

3. The employer is obligated to determine whether the qualifying individual can perform the essential functions with a "reasonable accommodation"–one which does not pose an undue hardship on the employer– and then provide the accommodation. This is an interactive process. The duty to provide the accommodation arises when:

   a. the individual is qualified to perform the essential functions of the job;

   b. the employer knows of the disability;

   c. the person seeks accommodation;

   d. the accommodation is necessary to enable the person to perform the essential functions of the job; and

   e. the accommodation is reasonable, does not create undue hardship, and does not pose genuine, direct health or safety risks to the employee or other employees. See Chevron v. Echazabal, 536 U.S. 73 (2002). NOTE: if an employer reserves light duty positions for employees with occupational injuries, the ADA requires employers to reassign any disabled employee to such an open light duty position if no other effective accommodation is available.

[See EEOC Enforcement Guidance: "Reasonable Accommodation and Undue Hardship Under the Americans with Disabilities Act"]

4. What is required to meet the duty of reasonable accommodation?

   a. A determination of what an employer must do in order to meet the duty of reasonable accommodation is dependent upon all the facts and is not subject to precise definition. A determination in one instance will be persuasive evidence in other, similar instances, but will not necessarily be dispositive. The following is a non-exhaustive list of some factors to be considered:

      - What are the functions of the job and the extent to which such functions will be affected by the proposed accommodation;

      - Actions taken by the employer previously or in other facilities;

      - Actions taken by the other employers in the same or similar businesses;

      - Nature of the accommodation;

- Effectiveness of the accommodation in removing the individual's job limitations;
- Nature and effectiveness of alternative means of accommodation, if any;
- Cost of the accommodation for the employer overall as well as for the particular facility, including net cost (considering available tax credits, deductions, and/or outside funding), total cost, marginal cost, short and long term cost;
- Financial resources of the employer overall and of the facility or facilities directly involved in making accommodation (e.g., the resources of the particular division office) and the net effect on the expenses and resources of that facility or facilities;
- Number of employees at the particular facility or facilities involved;
- Overall size, nature of the business, total number, type and location of its facilities, the total number of employees, and other characteristics of the employer;
- Type of operation of the employer, including composition, structure, and functions of the workforce "geographic separateness" of the employer's various facilities, the administrative and fiscal relationship between different facilities;
- Impact of the accommodation upon the operation and ability to conduct business of the facility in question and the employer overall;
- Impact on other employees and their ability to perform their duties;
- Health and safety risks to the affected person or others and the extent to which such risks can be reduced or eliminated; and
- Evidence of good faith efforts to explore less restrictive or less expensive alternatives.

b. An employer has no obligation to eliminate any of the essential functions of the position as an accommodation.

c. An employer is not required to create a new position as an accommodation for a disabled employee.

d. An employer is not required to provide an employee with the specific accommodation the employee wants. It is the employer's prerogative to choose the accommodation if there is more than one reasonable accommodation. Nevertheless, the employer should seriously consider the employee's proposed accommodation.

e. An employer is not required to provide the "best" accommodation possible, so long as it is sufficient to meet the job-related needs of the individual being

accommodated. For example, an employer would not have to restructure an employee's job duties if instead the employee could be provided with some device that enabled the employee to perform the essential functions of the job.

f. An employer also is not required to take any actions or provide any device or modification which is primarily for the personal benefit of the disabled individual. For example, an employer would not be required to provide a disabled applicant or employee with a prosthetic limb, wheelchair, eyeglasses, seeing eye dog, or pay for a medical procedure or operation which would not otherwise be covered by the employer's health plan.

5. A step-by-step process for accommodation of current employees.

a. Start of process: The need to consider possible accommodations normally is triggered when a person who meets all of the other qualifications for a job has requested an accommodation.

b. Initial response to the individual:

(1) Get basic information: If the employee first approaches his or her manager, which probably would be most common, the manager should be trained to obtain some basic, preliminary information regarding the nature of the claimed disability, what limitations the employee has, and what, if any accommodation the employee is seeking.

(2) Indicate others must be consulted: The manager then should advise the employee that s/he, the manager, must consult with human resources, the Disability Coordinator, or whomever has been designated pursuant to the company's policy to handle these matters.

(3) Avoid any premature commitments: The manager should avoid making any promises or commitments to the employee before the circumstance and potential accommodations have been completely analyzed.

(4) Affirm to the individual the company's EEO principles: Indicate clearly to the person that the company does not discriminate on the basis of disability and is fully committed to making reasonable accommodations for persons with disabilities in accordance with the law.

c. Involvement of the coordinating person(s):

(1) The manager then should contact the person(s) designated under the company's policy to coordinate requests for reasonable accommodation. Some cases may be very simple or straightforward, and, with some consultation the manager will be able to resolve the situation directly. Even in such situations, the resolution should be documented in the file and possibly by a confirming memorandum to the employee.

(2) Other situations may require greater attention and the further steps outline below.

d. Gather any further information needed from the individual:

(1) You should contact the individual, acknowledging his/her request for accommodation and gather any further information necessary to address the request. Depending on the circumstance, this contact with the employee might be done personally, by telephone, or in writing.

(2) Consult with the employee for his/her suggestions regarding potential accommodations.

(3) In most cases it will be important to obtain medical information from the employee's medical providers. The employee should be asked to provide a release to enable the company to obtain needed information.

e. Gather other necessary information:

(1) Obtain the employee's medical records and consult with employee's medical providers.

(2) Consult the company's records for similar situations in the past.

(3) It may be necessary to consult with experts and professionals, such as doctors, psychologists, rehabilitation consultants, or lawyers.

(4) There are a number of organizations and agencies, both private and governmental, that are available to assist employers in handling issues and problems raised in accommodating persons with disabilities. The EEOC's Technical Assistance Manual contains a useful Resource Directory identifying many such organizations. Two particularly helpful resources are the Job Accommodation Network and the regional centers for the National Institute on Disability and Rehabilitation Research ("NIDRR").

- The regional offices of the NIDRR were mandated by Congress and provide a "one-step" central source of information, direct technical assistance, training, and referrals. These offices are especially intended to meet the needs of small businesses.

- The Job Accommodation Network ("JAN") is a free consultant service funded by the President's Committee on Employment of People with Disabilities. JAN can provide particularized advice and suggestions for possible workplace accommodations.

f. Analyze the situation:

(1) Determine whether the claimed disability is in fact a disability, as defined under the law. This determination may require involvement of other experienced individuals, such as legal counsel, a doctor, or a psychologist.

(2) Analyze the particular job involved and determine its essential functions. (Ideally, this issue has been addressed and resolved well in advance, so

that, for example, the job description, job advertisement and other documents accurately define the essential functions).

(3) Identify the possible means of accommodation, if any, that would enable the employee to perform all the essential functions of the job.

(4) Determine which of the possible accommodations, if any, would be reasonable and not an undue hardship. Analyze the costs (financial and otherwise) and benefits of each, assessing the burdensomeness, reasonableness, and effectiveness of each proposal.

(a) If a proposed accommodation is something that the employer would not be required to provide because it is unreasonable or an undue financial hardship, the employee should be given the option of providing the accommodation or of paying that portion of the cost which constitutes the undue hardship on the operation of the business.

(b) There may be grants or tax credits available for providing an accommodation. These sources should be considered in evaluating the reasonableness of an accommodation in terms of its cost.

(5) Although each case must be decided on an individualized basis, considering its particular facts and circumstances, it is important to keep in mind the larger picture. Actions taken in this case may become precedents in any similar (or not so similar) future case. Similarly, actions taken in one division or department of a company may be cited as evidence of what is reasonable in other cases arising in other divisions or departments.

(6) If there are no reasonable accommodations that would enable the employee to perform in his/her current job, consider whether there are any vacant positions the employee might be qualified to fill. For companies that post all job openings, the employee should be directed to review the job postings and identify any in which s/he is interested.

g. Confer again with the individual: If there are any means of accommodations which are feasible, whether proposed by the company or the individual, try to reach agreement on the most appropriate means of accommodation. Agreement may not be possible, in which case the company should clearly communicate its proposal to the individual, give him/her a fair opportunity to consider it and accept or reject it (and seek employment elsewhere). In many cases this communication should be made or confirmed in writing. If reasonable accommodation is not possible, the company nonetheless has met its obligations under the law to make good faith efforts to accommodate – there is no absolute obligation under the statute to accommodate, only to offer reasonable accommodation.

h. Keep a record: Always maintain a record of the actions taken and those proposed but not taken, including the reason(s) for each. This will be a useful reference if other, similar circumstances arise, and it will help ensure that the company treats

all individuals equally. It often may be advisable as well to confirm the resolution of a situation in a memorandum to the employee.

6. This is an anti-discrimination statute: don't treat employees differently on the basis of their disability. Be aware of the anti-retaliation and attorney's fees provisions in 42 U.S.C. Sec. 12201-13. Also, under the ADA an employer cannot discriminate against an individual because of his or her association with an individual with a disability.

7. Medical certification of disability or condition: see below, section III

C. Family and Medical Leave Act of 1993: 29 U.S.C. § 2601 et seq.; Department of Labor Rules 29 C.F.R. § 825.100 et seq.

1. Applies to employers with 50 or more employees (in each work day and 20 or more work weeks in a current or preceding calendar year) within a 75 mile radius. Also applies to all public agencies and all schools regardless of the number of employees. Applies to employees who have worked one year and at least 1,250 hours.

2. Generally requires an employer to grant employees up to 12 weeks of unpaid* leave during a 12-month period, with a continuation of group health benefits and the assurance of job restoration, for

   a. the treatment of a "serious health condition"

   b. birth or adoption of a child

   c. the care of an immediate family member (spouse, child, or parent) with a serious health condition.

   See: EEOC Enforcement Guidance: Unlawful Disparate Treatment of Workers with Caregiver's Responsibility, 5/23/07.

Even though the FMLA only requires an unpaid leave, an employee may elect, or the employer may require the employee, to substitute vacation, personal leave, or any other leave granted under the contract, collective bargaining agreement, policy, or handbook. 29 U.S.C. 2612(d)(2).

3. "Serious health condition" is defined as an illness, injury, impairment, or physical or mental condition that involves:

   a. in-patient care

   b. any period of incapacity requiring an absence from work, school or other regular daily activity of more than 3 calendar days and that involves continuing treatment by a health care provider. Does not include cosmetic treatments unless in-patient care is required or unless complications develop. Does not include colds, flu, earaches, upset stomach, minor ulcers, etc.

   c. continuing treatment by a health care provider for prenatal care or a chronic or long term health condition that is incurable or which, if left untreated, would likely result in a period of incapacity of more than 3 days

4. Intermittent leave is allowed if medically necessary and the leave can best be accomplished through an intermittent or reduced leave schedule. Be careful: holidays during a week of FMLA leave have no effect on FMLA intermittent leave calculation. See, e.g., Mellen v. Trustees of Boston University, 2007 U.S. App. LEXIS 22518 (1st Cir. 9/21/07).

5. Notice requirement: an employee must give at least 30 days notice before the start of the leave if it is foreseeable.

6. Protections:

   a. upon return from leave, restored to original (or equivalent) job,

   b. with equivalent pay and benefits, and

   c. no loss of employment benefits during the leave.

   d. Anti-retaliation provision: 29 U.S.C. 2625(a)(1)-(2); 29 C.F.R. 825.220(c). Don't interfere with an employee's efforts to exercise FMLA rights.

*NOTE: there is a narrow exception excusing employers from holding positions open for certain highly paid "key employees" whose jobs might not be protected if job restoration would cause substantial and grievous economic injury to the employer's operation (19 C.F.R. 825.218, 219) and the employer provides written notice to the key employee of its intent to deny reinstatement. 29 U.S.C. 2614(b).

7. The FMLA does not require that the employer provide accommodation to the employee. See Chapman v. UPMC Health System, 2007 U.S. Dist. LEXIS 70979 (W.D. Pa. 9/25/07). Note also that an employer cannot require an FMLA-eligible employee to take a light duty job, but the employee may choose to do so if one is available. Hendricks v. Compass Group USA Inc., 2007 U.S. App. LEXIS 18606 (7th Cir. 8/6/07).

NOTE: The Pregnancy Discrimination Act, which is a part of Title VII of the Civil Rights Act of 1964, does not mandate leave, but entitles pregnant women to be treated the same as employees with other temporary medical disabilities. The FMLA specifically provides that any period of incapacity due to pregnancy is a "serious health condition".

III. Specific Situations Inviting Comparison

A. Medical Inquiries

1. ADA:

   a. Pre-offer inquiries are not allowed, except where it is obvious that an accommodation will be necessary or the applicant voluntarily discuses the need for an accommodation.

   b. Post-offer inquiries must be limited to determining the ability to perform the job functions. An employer may request medical documentation of the need for an accommodation. In the post offer stage, the employer can obtain information about prior occupational injuries, provided it requires all entering employees in

the same job category to have the same medical exam and provide the same information.

2. FMLA:

   a. An employer must request medical information in writing with 2 days of a request for leave. The employee has 15 days to obtain the information. 29 C.F.R. 825.305(b). An employer must advise an employee of the consequences of failing to submit a medical certification.

   b. Use the "Certification of Health Care Provider" form provided by the Department of Labor which includes a brief statement of medical facts, date and expected duration of condition, incapacity and treatment regimen. 26 U.S.C. 2613(b); 29 C.F.R. 825.306

   c. An employer is not allowed to contact an employee's doctor directly, but may have its doctor contact the employee's doctor, if the employee consents, but only for clarification of what is stated in the certification form. If there is reason to doubt medical information, the employer may request a second opinion, at the employer's expense and by a health care provider not regularly used by the employer. If the first and second opinions differ, a third and binding opinion may be required, and the employee and employer must agree, in good faith, on who will provide the third opinion.

3. Workers' Compensation:

   a. Medical proof is required at all stages, from the moment the injury occurs until healing is complete.

   b. Information obtained through investigation of a workers' compensation claim, if it extends beyond the scope of information that may be obtained under the FMLA, may not be used to deny FMLA leave. Similarly, an employer may have to ignore information from a workers' comp investigation that does not relate to the employee's ability to perform the essential functions of the job.

NOTE: Medical information generated in handling workers' compensation claims or in any ADA or FMLA procedure must be kept confidential. Develop a system within your human resources office that will allow the "right" person to know the information for purposes of making accommodations but will prevent any other employees from knowing. Prevent a "perceived as disabled" ADA situation or a HIPAA violation.

B. Fitness for Duty Requirements

1. ADA: any return-to-work physical exam must be job related and consistent with business necessity.

2. FMLA: employers are permitted to require employees to recertify every 30 days when the leave is due to the employee's own health. Must have a uniformly applied practice or policy establishing the recertification procedure. 29 C.F.R. 825.310. It need not be an elaborate report from a physician but can be a simple statement that the employee is able to return to work. 825.310(c). Any clarification sought by the employer's own physician must be limited to the serious health condition for which the leave was taken. An employer may delay the return to work until the employee submits a required fitness for

duty certification provided the employer gave proper notice. 825.310(f); 825.311(c). Also, an employer can deny reinstatement (i.e. terminate or transfer) following leave if the employee cannot perform the essential functions of her job or if the job was legitimately eliminated and would have been eliminated even if she was not on leave.

3. Workers' Comp: see Mont. Code Ann. § 39-71-712 for temporary partial disability situations and return to work with a physical restriction

C. Remedies

1. ADA: Hiring or reinstatement, injunctive relief requiring reasonable accommodations, back pay, compensatory and punitive damages (subject to caps depending on size of employer) for intentional discrimination, and attorneys fees. "Good faith" defenses: the employer consulted with the employee regarding accommodations and the employee failed to suggest anything reasonable or refused a reasonable accommodation.

2. FMLA: Reinstatement, back pay, liquidated (double) damages if violation was "willful", and attorneys' fees. Corporate officers and supervisors may be held personally liable.

3. Workers' Compensation: payment of wages and medical bills during the time of healing, unless it is a permanent disability, which would provide wages and medical expenses until normal retirement age. Preference (with the same employer) over other applicants for comparable positions that become vacant that fit the worker's physical condition and vocational abilities. Note: termination for filing a workers' compensation claim is wrongful retaliation and vests the District Court with jurisdiction.